Supreme Court
New South Wales

Medium Neutral Citation:	**Les & Zelda Investments Pty Ltd (ACN 148 907 573) as Trustee for Les & Zelda Family Trust v Whitehaven Coal Limited (No 2) [2022] NSWSC 741**
Hearing dates:	12 May 2022
Decision date:	08 June 2022
Jurisdiction:	Equity - Commercial List
Before:	Ball J
Decision:	(1) Vacate orders (1) and (2) of the orders made by the Court on 19 November 2020; (2) Order that the plaintiff provide, by way of bank guarantee or by payment into Court, further security for the defendant's costs in the amount of $850,000 in respect of costs billed to the defendant up to and including 31 March 2022; (3) The proceedings be stayed if order (2) is not complied with within 28 days of the date of these orders until such time as the security is provided; (4) Grant liberty to the defendant to apply for further security in respect of costs billed after 31 March 2022. (5) Order that the plaintiff pay the defendant’s costs of the notice of motion filed on 17 November 2021.
Catchwords:	COSTS — Security for costs — Quantum and form — Where antecedent orders made for security to be given in tranches — Applicant seeks additional security to “top-up” amounts ordered by reference to past costs actually incurred
Legislation Cited:	*Civil Procedure Act 2005* (NSW) *Corporations Act 2001* (Cth) Legal Profession Uniform Law (NSW)

Cases Cited:	*Allsop Investments Pty Ltd v Jerkovic* [2021] NSWSC 1399 *Broadway Plaza Investments v Broadway Plaza Pty Ltd* [2019] NSWSC 1082 *Brundza v Robbie & Co (No 2)* [1952] HCA 49; (1952) 88 CLR 171 *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497; [1987] FCA 102 *Devenish v Jewel Food Stores Pty Ltd* [1990] HCA 35; (1990) 64 ALJR 533 *Les & Zelda Investments Pty Ltd v Whitehaven Coal Ltd* [2020] NSWSC 1091 *McLaughlin v Daily Telegraph Newspaper Co Ltd (No 1)* [1904] HCA 5; (1904) 1 CLR 143 *Precise Training Pty Ltd v Chief Commissioner of State Revenue* [2020] NSWSC 1202 *Tripple Take Pty Ltd v Clark Rubber Franchising Pty Ltd* [2005] NSWSC 1169 *Voxson Pty Ltd v Telstra Corporation Ltd (No 8)* [2017] FCA 1427 *Wollongong City Council v Legal Business Centre Pty Ltd* [2012] NSWCA 245
Texts Cited:	GE Dal Pont, *Law of Costs* (4th ed, 2018, LexisNexis Butterworths)
Category:	Procedural rulings
Parties:	Whitehaven Coal Limited (Applicant | Defendant) Les & Zelda Investments Pty Ltd (ACN 148 907 573) as Trustee for Les & Zelda Family Trust (Respondent | Plaintiff)
Representation:	Counsel: E Collins SC with I Ahmed (Applicant | Defendant) R Foreman SC with B O'Connor (Respondent | Plaintiff) Solicitors: Allens Linklaters (Applicant | Defendant) Watson Mangioni Lawyers Pty Ltd (Respondent | Plaintiff)
File Number(s):	2019/184678
Publication restriction:	None

JUDGMENT

1 By a notice of motion filed on 17 November 2021, the defendant, Whitehaven Coal Limited (***Whitehaven***), seeks an order that the plaintiff, Les & Zelda Investments Pty Ltd (***LZI***), "provide further security for [Whitehaven's] costs of the proceedings by

paying into the Court such amounts as may be ordered by the Court on the hearing of this motion".

Background

2 Before addressing the application directly, it is necessary to say something about the history of the matter.

3 This is the fourth tranche of security sought by Whitehaven. It is not expected to be the last. The first tranche was ordered in accordance with consent orders made at a directions hearing on 12 July 2019. Those orders relevantly were in the following terms:

> 3. The Plaintiff provide, as an initial tranche, security for the Defendant's costs in the amount of $500,000 by 26 July 2019 in a form to be agreed between the parties and, failing agreement, the proceedings be stayed and there be liberty to apply for further orders.
>
> 4. That the Defendant have liberty to apply for further security if otherwise entitled.

4 Consistently with those orders, Whitehaven made an application for further security by notice of motion filed on 26 May 2020. That application was heard over a two-day period by Parker J. His Honour made orders on 5 August 2020 and published detailed reasons for judgment on 19 August 2020: see *Les & Zelda Investments Pty Ltd v Whitehaven Coal Ltd* [2020] NSWSC 1091. Relevantly, his Honour made the following orders:

> 1 The plaintiff provide, by way of bank guarantee or by payment into Court, a second tranche of security for the defendant's costs in the amount of $800,000.00, payable in the following instalments:
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> a. $300,000.00 payable on 28 August 2020; and
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> b. $250,000.00 payable on 25 September 2020; and
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> c. $250,000.00 payable on 23 October 2020.
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> 2 That, in the event that the security set out in orders 1(a), (b) or (c) is not provided by the respective dates in those orders, the proceedings be stayed.

5 Parker J explained, at [26], the approach he had taken in making those orders in these terms:

> Given the large uncertainties which still exist about what Whitehaven's total costs will eventually be, and the total amount of security which will need to be provided, it is much better to approach the present application by aggregating all of the costs incurred to this point, and fixing the further security to be provided by reference to those total costs. I propose to deal with the application in that way.

6 It is apparent from Parker J's judgment that he thought that approach was appropriate in this case because of the complexity of the case and the consequent difficulties of making an accurate assessment of Whitehaven's recoverable costs, the fact that it was not suggested that the provision of security in the amounts sought by Whitehaven would stultify the proceedings and the fact that it was not suggested that any delay in

bringing the application (and therefore in identifying the amount of security to be provided) had made any difference to Mr Nathan Tinkler, the person who his Honour found was funding the proceedings.

7 As his Honour explained, that approach benefited both LZI and Whitehaven: at [21]. It reduced the risk that LZI would be required to provide more security than necessary, since any amount ordered in the future could be adjusted to take account of costs actually incurred. For similar reasons, it reduced the risk that Whitehaven would be out of pocket for its recoverable costs if ultimately it was successful because the security was inadequate to cover those costs and LZI (as was accepted) was impecunious.

8 The evidence before Parker J was that Whitehaven had incurred costs (excluding GST) up until 9 July 2020 of approximately $1.7 million and that the costs of completing discovery were in the order of $300,000. Whitehaven had filed expert evidence from Mr Paul Taylor, a cost consultant, who expressed the opinion that Whitehaven was likely to recover on assessment (excluding costs of the motion before Parker J) an amount of approximately $1,333,000. Taking account of the $500,000 of security that had already been provided and allowing for another minor adjustment the total amount of additional security sought was in the order of $833,000.

9 In the event, Parker J allowed an additional $800,000 in security. In reaching that figure, his Honour (1) deducted from the $2 million the sum of $150,000 which was the approximate costs of the application for security; (2) applying a broad-brush approach, concluded that it was appropriate to order a further $750,000 in security; and (3) concluded that LZI should pay the costs of the motion and that therefore security should be increased by a further $50,000 in respect of those costs.

10 In reaching the conclusion referred to in (2), his Honour accepted Whitehaven's evidence concerning the estimated costs of discovery (at [87]), took into account that, if Whitehaven was successful, it could expect to recover interest on its costs (at [88]) and took into account the fact that his Honour proposed to order that security be provided in tranches (at [89]).

11 In relation to the conclusion referred to in (3), his Honour said (at [99]–[100]):

> In the end, I decided to increase the amount of security by $50,000. I was aware that Whitehaven has quantified its costs of the security application at $150,000 (see above) and this figure might not have included all the solicitors' costs, or counsel's fees. But I thought that, on the face of it, this was quite a high figure for an application which was only contested on quantum.
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> But although I was not prepared to go beyond $50,000 at this point, it should be clear that the costs awarded under my order are not limited to $50,000, and when the time comes for the fixing of the next tranche of security, I regard it as open to Whitehaven to seek to have the figure topped up, if it can show that its reasonable recoverable costs of the security application will exceed the $50,000 I ordered.

12 By a notice of motion filed on 12 November 2020, Whitehaven sought additional security. Specifically, it sought the following orders:

> 1. The Plaintiff provide an initial tranche of further security for the costs of the Defendant's lay and expert evidence in the amount of $200,000 payable within 14 days of the date the order is made.

> 2. The Plaintiff provide a further amount of security for the Defendants [sic] costs of the Defendant's Notice of Motion filed 26 May 2020 in the amount of $75,000 payable within 14 days of the date the order is made.
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> …

13 On 20 November 2020, the Court made the following orders by consent in relation to the motion:

> 1 Within 30 days of the date that this order is made the Plaintiff provide a further tranche security [sic] in the amount of $225,000:
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> (a) as an initial tranche of security for the costs of the Defendant's lay and expert evidence; and
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> (b) as a further amount of security for the Defendant's costs of the Defendant's Notice of Motion filed 26 May 2020.
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> 2 In lieu of the security referred to in order 1 being provided, the proceedings be stayed.
>
> 3 The Defendant's Notice of Motion filed 12 November 2020 be dismissed with no order as to costs.
>
> …

The current application

14 Although the notice of motion currently before the Court does not seek any specific amount in respect of security, the amount sought by Whitehaven in its written submissions is $1 million. In support of that amount, Whitehaven relied on evidence from Mr Jonathan Light, a partner of Allens who has the conduct of the matter of behalf of Whitehaven, and a further report prepared by Mr Taylor.

15 Mr Light's evidence (given in a supplementary affidavit affirmed on 2 May 2022) was to the effect that Whitehaven's billed costs up to and including Allens' invoice dated 31 March 2022 (excluding GST) are $3,303,937.93 (which covers work done up to and including 22 March 2022). Mr Light also estimated that the costs of preparing a defence to LZI's further amended statement of claim was in the order of $55,000. Mr Taylor, who prepared a report dated 22 November 2021, expressed the opinion that the fair and reasonable quantum of costs incurred by Whitehaven that are covered by invoices issued between 31 July 2020 and 30 September 2021 (and therefore the amount that was likely to be recovered on assessment in respect of those invoices) was $1,301,409.96 (excluding GST). He did not prepare a supplementary report dealing with the period from October 2021 to March 2022.

16 LZI raised a number of arguments in opposition to orders sought in the motion that had also been raised before Parker J.

17 One argument was that Whitehaven had delayed in making the application for security. That argument must be rejected. Delay is relevant to an application for security. It has been reiterated on many occasions that applications for security should be brought promptly: see *McLaughlin v Daily Telegraph Newspaper Co Ltd (No 1)* [1904] HCA 5; (1904) 1 CLR 143 at 145; *Brundza v Robbie & Co (No 2)* [1952] HCA 49; (1952) 88 CLR 171 at 175; *Devenish v Jewel Food Stores Pty Ltd* [1990] HCA 35; (1990) 64 ALJR 533 at 534; see further *Tripple Take Pty Ltd v Clark Rubber Franchising Pty Ltd* [2005]

NSWSC 1169 at [6] per Einstein J. This is predominantly because it would be unfair for the plaintiff to provide security after it had already incurred significant expenses towards litigating its claim. However, delay is not a 'disentitling factor' by itself: *Wollongong City Council v Legal Business Centre Pty Ltd* [2012] NSWCA 245 at [32], citing *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497; [1987] FCA 102 (***Fencott v Eretta***). Here, it must have been plain that Whitehaven would make an application for further security. Unsurprisingly, there is no suggestion, let alone evidence, that LZI, or those funding it, would have acted any differently had they known that an application for security would be made. Consequently, there can be no suggestion that it or they have been prejudiced by the delay.

18 Another argument raised by LZI is that the purpose of an order for security is not to provide the defendant with a full indemnity in respect of costs. That argument was addressed in detail by Parker J: at [52]ff. It is unnecessary to address it again. The purpose of an order for security under s 1335 of the *Corporations Act 2001* (Cth) is to protect a successful defendant against being out of pocket for its costs because the plaintiff company has insufficient assets to pay them. "Costs" in this context is clearly a reference to recoverable costs. Accordingly, the defendant's estimated recoverable costs are an important matter in fixing the amount of security. But other matters are also relevant to the question of quantum, including the effect that an order for security in a particular amount may have on the ability of the plaintiff to continue the proceedings. No reasons were given nor was any evidence advanced for why in the particular circumstances of this case it was inappropriate, adopting a broad-brush approach as the authorities require, for the Court to fix the amount of security by reference to Whitehaven's likely recoverable costs if it is successful.

19 A third argument was that the Court should not award security on the basis of what Perram J described in *Voxson Pty Ltd v Telstra Corporation Ltd (No 8)* [2017] FCA 1427 at [16] as a "Rolls Royce" defence to the claim, and should discount Whitehaven's costs because it has chosen to conduct such a defence. Like Parker J, I would prefer not to characterise the issue quite in that way. Costs must be proportionate to the complexity of the matter and the amount claimed: see *Civil Procedure Act 2005* (NSW) s 60. Consequently, in fixing the amount of security it is appropriate to take account of the complexity of the case and the amount claimed as well as any evidence on the likely costs that will be recovered on assessment if the defendant is successful. Those matters are also relevant to the assessment of costs: see Legal Profession Uniform Law (NSW) ss 172 and 200(1). As Parker J explained, the present case is complicated. LZI seeks to recover for itself and other members of the class on whose behalf the claim is brought many millions of dollars. The claim has been hard-fought, as the contests in relation to security demonstrate. The claim has also had a complicated procedural history, which includes a decision by LZI to replead its case completely.

Taking those matters into account, I would not apply a discount to Whitehaven's actual costs to reflect the way in which the defence has been conducted (as opposed to what might be recoverable on assessment).

20 LZI's principal submission was that Parker J had already ordered security for the costs in respect of which Whitehaven now seeks security and that consequently any award of additional security would be double dipping.

21 That submission is best explained by referring to a couple of examples. There was evidence before Parker J that Whitehaven's actual costs of giving discovery would be $300,000. There was a dispute about the reasonableness of that estimate that was largely resolved in Whitehaven's favour, with the result that Parker J's order for security took account of those costs. In fact, it is now known that the costs of giving discovery were substantially more than the $300,000. It is LZI's contention that any order that gives security for discovery must give credit for the fact that LZI has already provided security in respect of giving discovery to the amount of $300,000. Similarly, under the consent orders made on 19 November 2020, the parties compromised Whitehaven's claim for an initial tranche of security for the costs of preparing evidence (together with the additional costs of the motion heard by Parker J) at $225,000. Consequently, it is said, LZI has already given security for the costs of preparing evidence up to the amount of $200,000 (the amount claimed in the motion as security for that work). Accordingly, LZI submits that, to the extent that Whitehaven includes work done in preparing evidence in the costs that form the basis of the current application for security it is double dipping, since security has already been given in respect of those costs. Moreover, it was agreed that each party should bear its own costs of the motion dated 12 November 2020. Consequently, no security should be ordered in respect of those costs. Similarly, the parties agreed to bear their own costs of a motion dated 16 October 2020 relating to the redaction of discovered documents.

22 Generally speaking, there are three approaches that a court might take to ordering security in tranches. One simple and orthodox approach is to fix the total amount of security in advance and order that it be provided in stages. Another orthodox approach is to order security for particular stages of the proceedings (up to the close of pleadings, up to the completion of evidence, up to the completion of discovery and so on). In both cases, the amount of security is fixed prospectively. Normally, a court is reluctant to order security for past costs. That is because it is thought to be reasonable that the plaintiff should know the price (in the form of security) that it must pay in order to continue the action so that it can make an informed decision whether or not to do so. Moreover the Court should be reluctant to order security where the defendant has chosen to incur costs without seeking the protection of an order for security in advance: see *Allsop Investments Pty Ltd v Jerkovic* [2021] NSWSC 1399 at [17] per Slattery J; *Precise Training Pty Ltd v Chief Commissioner of State Revenue* [2020] NSWSC 1202 at [86] per Williams J; see further GE Dal Pont, *Law of Costs* (4th ed, 2018, LexisNexis Butterworths) at [28.37]. However, in exceptional cases, the Court may be prepared to

order additional security in respect of a particular stage in respect of which security has already been ordered because it transpires that the costs of completing that stage were substantially more than was anticipated at the time security was ordered.

23 A third approach is to fix the amount of security by reference to costs actually incurred up to particular points in the proceeding. As I have explained, that approach is less orthodox because it involves ordering security in respect of past costs. However, it may be appropriate where it is particularly difficult to estimate the costs of the proceedings and where there is no particular reason to fix the amount of security in advance of the costs being incurred. The alternative approach allows for a more accurate assessment of security, since security is assessed by reference to costs that are largely known. It also has built into it a level of conservatism because no allowance is made for future costs which will be incurred before the next tranche of security is ordered. In large and complicated cases, such as the present one, those costs could be substantial.

24 Up until now, the approach followed by the parties has been a hybrid approach. The initial consent order for security did not relate to any specific costs that had been incurred or were to be incurred. The evidence before Parker J largely concerned past costs and was no doubt directed at establishing that, on any view, the existing security had been exhausted. Even so, the amount of security actually sought by Whitehaven was calculated largely by reference to past costs and that is the basis on which Parker J made the order that he did and the basis on which Parker J anticipated further orders for security would be made. However, the evidence before Parker J also included evidence of the unbilled and estimated costs of giving discovery. Justice Parker took that evidence into account in making the order he did. The security agreed by the parties and reflected in the consent orders made by the Court on 19 November 2020, at least so far as they concerned the costs of preparing evidence, largely appear to have related to future costs, but contemplated a right to make an application for further security in respect of that work if the security that it was agreed would be provided was inadequate. The evidence filed by Whitehaven on the current application concerns past costs and Whitehaven made it clear that it was only seeking additional security in respect of those costs.

25 To a large extent, the dispute between the parties turns on a characterisation of the approach taken to security to date and the approach that ought to be taken. On its current application, Whitehaven, consistently with Parker J's judgment, seeks to identify all the costs that it has incurred and seeks security in an appropriate amount to cover past costs, giving credit for the security LZI has already provided. On the other hand, LZI takes the position that the Court has already fixed the amount of security for past

costs on certain assumptions and maintains that the Court should only order additional security if Whitehaven is able to establish that it has done more work than the work contemplated by the security that has already been granted.

26 Those differences between the parties raise two issues. The first is what approach should be taken in relation to costs to date. The second is what approach should be taken going forward.

27 In my opinion, going forward it is desirable that security be fixed by reference to past costs. That approach was embraced by Whitehaven at the hearing. The approach is largely consistent with the approach taken by Parker J, since security is fixed having regard to the actual costs incurred. The approach is appropriate given the difficulties of estimating the likely costs of each stage of the proceeding because of the complexity of the proceedings. It was not suggested that that approach would cause any injustice to LZI. To a substantial extent it is to LZI's benefit, since it eliminates the risk that it will be required to provide security in excess of what is necessary. Also, as I have explained, it introduces a degree of conservatism, since no security will be in place for work done between one tranche and the next.

28 In order to implement that approach it is necessary to determine the amount of additional security, if any, to be awarded on the current application on the basis that that is the total amount of security to be awarded for work done up until a fixed point in time. Whitehaven would then be entitled periodically to apply for additional security for work done after that time. On each occasion, security would be fixed for work done since the previous application. That approach would reduce the level of disputation between the parties, since the only question that would need to be answered is the amount of security to be provided for an identifiable amount of work. Without attributing blame to either party, it is apparent that too many resources and costs have been devoted to making and to resisting applications for security for costs.

29 Estimations of security are often an imprecise exercise, in which a broad-brush approach should be adopted: see *Broadway Plaza Investments v Broadway Plaza Pty Ltd* [2019] NSWSC 1082 at [206] per Ward CJ in Eq. As French J acknowledged in *Fencott v Eretta*, "[t]he process of estimation embodies to a considerable extent, necessary reliance on the 'feel' of the case after considering relevant factors": at 515 (citations omitted). In the current proceedings, the estimations must be considered against the backdrop of antecedent orders made by Parker J, where, as explained below, they could not have been intended to preclude adjustment to the amount of security to be provided.

30 The question then remains what should be done about the current application. I have concluded that it is appropriate to fix the amount of security by reference to the total costs Whitehaven has incurred up until the last account in evidence — that is, for work

done that has been billed up until 31 March 2022. I have also concluded that it is appropriate to make some deduction from that amount to take account of the matters raised by LZI.

31 As to the basic approach, it seems to me that it is consistent with the approach taken by Parker J. Justice Parker plainly left it open for future applications for security to be adjusted having regard to actual costs incurred and, as I have explained, the application before him and the orders he made largely related to past costs. It is desirable that the Court adopt a consistent approach to security for costs in this matter; and, as I have sought to explain, there are obvious benefits in this case in fixing security with hindsight.

32 As to the adjustment, it should be made in the interests of justice. The parties reached an agreement reflected in the orders made on 19 November 2020 in relation to one tranche of security. LZI might reasonably have thought that the effect of that agreement was to finalise the question of security in relation to the costs of the motion heard by Parker J and to provide security for the costs of preparing evidence. LZI did not agree to provide the security to cover past costs generally.

33 Applying that approach, the total amount of security to which Whitehaven says it is entitled is $2,442,498.50. That figure is the total of (1) the amount of $993,297.04, which Mr Taylor in his first report dated 29 May 2020 estimated Whitehaven would recover on assessment in respect of costs and disbursements billed up to June 2020 (less a minor adjustment of $6,152.21 for a calculation error); (2) the amount of $1,301,409.96, which Mr Taylor in his second report dated 22 November 2021 estimated Whitehaven would recover on assessment in respect of costs and disbursements billed between July 2020 and September 2021; (3) 70 percent of $177,675 (the amount of solicitors fees billed between October 2021 and March 2022) — that is, $124,372.50; and (4) the amount of $23,419 for disbursements billed between October 2021 and March 2022. The amount of 70 percent is said to be consistent with the amount allowed by Mr Taylor in his two reports in respect of solicitors' fees (73.95 percent). The amount of $23,419 is said to be consistent with the fact that Mr Taylor expressed the opinion in both his reports that Whitehaven would recover 100 percent of its disbursements.

34 The total amount of security that Whitehaven has received is $1,520,000 ($500,000 plus $800,000 plus $225,000). On that basis, Whitehaven claims a further $922,498.50, which can be rounded to $900,000. Adoption of that figure necessarily involves vacating the order for security on 19 November 2020 and giving LZI credit for the amount that it provided as security in accordance with those orders.

35 In my opinion, that is a reasonable starting point. It is supported by the unchallenged evidence of Mr Taylor. It was reasonable for Whitehaven to use the percentage recovery rate for solicitors' fees implied by Mr Taylor's calculations (73.95 percent) and apply that rate (or, more accurately the rounded rate of 70 percent) to amounts billed between October 2021 and March 2022 and to assume that, on assessment,

Whitehaven would recover 100 percent of its disbursements. It was not suggested that the nature of the work done or disbursements incurred in the period from October 2021 to March 2022 was so different compared to the earlier periods that the earlier periods provided an unreliable guide. The amounts Mr Taylor thought were recoverable do not appear to be unreasonable having regard to the work involved. Moreover, as Parker J explained, there is a degree of conservatism in that figure arising from the fact that Whitehaven could expect to recover interest on its costs if it is successful and, as I have sought to explain, there is a degree of conservatism arising from the fact that no security will be provided for costs incurred between one application for security and the next.

36 That leaves the question of what adjustment should be made for the matters raised by LZI. In my opinion, no adjustment should be made for the fact that it has emerged that the costs of some work (such as giving discovery) have proved to be greater than anticipated. The orders contemplated by Parker J anticipated that adjustments would be made in those circumstances and, provided the amount claimed is fair and reasonable for the work that was done, there is no reason why security should not be given in respect of those costs. Nor do I think that any adjustment needs to be made for the fact that the third tranche of security was intended to cover the future costs of preparing evidence. The parties specifically agreed that the security that was provided was only an initial tranche for that work. It would be possible to treat that security as having been set aside for that purpose. But if the Court were to do that, that would only mean that the amount of security ordered in respect of past costs should be increased because the third tranche of security was not available for that purpose (except to the extent that it covered the costs of the notice of motion filed on 26 May 2020).

37 On the other hand, I think some adjustment must be made for the fact that the third tranche of security included an amount for the costs of the motion filed on 26 May 2020 and the fact that the parties agreed to bear their own costs of the motion. LZI might reasonably have thought that the provision of that security was intended to resolve the question of how much security should be provided in respect of that notice of motion. It is apparent from the consent orders that no security should be ordered in respect of the costs of the motion.

38 One difficulty in fixing the amount of the adjustment is that there is no evidence before the Court on what costs Whitehaven incurred in relation to the notices of motion dated 16 October 2020 and 12 November 2020. Another is that the orders made on 19 November 2020 do not distinguish between the additional security given in respect of the notice of motion and the security given for the costs of preparing evidence. Consequently, it is not possible to say what amount of security the parties agreed on in respect of the $150,000 was actually incurred in relation to the notice of motion. No doubt there are various approaches the Court could take at arriving at a conclusion about that matter and calculating what allowance should therefore be made in fixing the amount of security. However, in my opinion, it is unnecessary to embark on those

calculations. In fixing security generally, the Court is required to take a broad-brush approach: see [29] above. Such an approach recognises that mathematical precision is neither possible nor justified in this context. I accept that it is reasonable to infer that the costs of the two motions were small because both were resolved shortly after they were filed. Moreover, it is reasonable to infer that the bulk of the order for security made on 19 November 2020 related to the future costs of preparing evidence. Taking these matters into account, in my opinion, the amount of security should be reduced by $50,000 to allow for the issue raised by LZI. On that basis, Whitehaven is entitled to additional security in the amount of $850,000.

Orders and Costs

39 In my opinion, it is appropriate that LZI should pay Whitehaven's costs of its motion. Although Whitehaven was not successful in obtaining all of the security it sought, it has been successful in obtaining a substantial additional tranche of security largely for the reasons it advanced and in circumstances where LZI resisted providing any additional security.

40 In supplementary submissions, Whitehaven also sought an order that LZI pay its costs thrown away by reason of LZI's amended claim. In the normal course of events, that order would be made. However, it was not addressed by LZI. If the parties cannot agree on that order, it should be sought at the next directions hearing.

41 Accordingly, the orders of the Court are:

(1) Vacate orders (1) and (2) of the orders made by the Court on 19 November 2020;

(2) Order that the plaintiff provide, by way of bank guarantee or by payment into Court, further security for the defendant's costs in the amount of $850,000 in respect of costs billed to the defendant up to and including 31 March 2022;

(3) The proceedings be stayed if order (2) is not complied with within 28 days of the date of these orders until such time as the security is provided;

(4) Grant liberty to the defendant to apply for further security in respect of costs billed after 31 March 2022.

(5) Order that the plaintiff pay the defendant's costs of the notice of motion filed on 17 November 2021.

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Decision last updated: 08 June 2022